PD-0038&0039-21
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 6/15/2021 4:34 PM
Accepted 6/16/2021 8:15 AM
DEANA WILLIAMSON
CLERK

Nos. PD-0038-21 & PD-0039-21
(Consolidated Appeals)

FILED
COURT OF CRIMINAL APPEALS
6/16/2021
DEANA WILLIAMSON, CLERK

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

JOHNNY JOE AVALOS
Appellant

VS.

THE STATE OF TEXAS
Appellee

APPELLANT'S BRIEF ON THE MERITS

ON DISCRETIONARY REVIEW FROM
THE FOURTH COURT OF APPEALS, SAN ANTONIO, TEXAS

APPEAL FROM BEXAR COUNTY

JORGE G. ARISTOTELIDIS
Tower Life Building
310 South St. Mary's St.,
Suite 1910
San Antonio, Texas 78205
(210) 277-1906
jgaristo67@gmail.com
SBN: 00783557

Attorney for Defendant, Appellant

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STATEMENT REGARDING ORAL ARGUMENT

The Court has denied oral argument, and will determine the merits of Avalos's constitutional challenge *via* submission on briefs.

STATEMENT OF THE FACTS

Mr. Avalos was indicted for, and pled guilty to capital murder, specifically, the murder of five women. Testing by experts for the state and the defense determined that Mr. Avalos is intellectually disabled, with aggregate IQ score between 66 and 67. Additional testing by Avalos's court-appointed experts demonstrated a significant equivalency in age and education between Avalos and juveniles, and a support for the applicability of the Supreme Court's holding in *Miller v. Alabama*, 567 U.S. 460 (2012).

Dr. Joan Mayfield:

Dr. Mayfield, a neuropsychologist appointed to assist the defense, evaluated Mr. Avalos at several intervals prior to his plea.

On May 14, 2016, testing began on Mr. Avalos. Dr. Mayfield explained that "regardless of the definition used (AA IDD, DSM-5 or the Texas Health & Safety Code) a diagnosis of intellectual disability is based on three criteria: 1) significant limitations in intellectual functioning: 2) significant limitations in adaptive behavior as expressed in conceptual, social, and practical skills: and 3) onset before age 18.

CR50. There are school records indicating that Avalos began attending special education classes in third grade and had an ARD (admission, review, and dismissal meeting). CR51. Records indicated that Mr. Avalos was never in a regular education class setting: he was educated in a resource room or a self-contained mild/moderate/severe special education setting. *Id*. Through testing, Dr. Mayfield determined that Mr. Avalos suffered from intellectual disability, resulting in a "Full Scale IQ" of 66, described as "Extremely Low." CR51. Mr. Avalos's scores were "consistent with the presence of significant limitations in intellectual functioning." *Id*. For example:

> 2. Deficits in adaptive functioning (the second criteria) refers to how well a person meets community Standards 10.8 of personal independence and social responsibility, in comparison to others of similar age and sociocultural background. "Adaptive functioning may be difficult to assess in controlled settings (e.g. prisons. detention centers); if possible, corroborative information reflecting functioning outside those setting should be obtained" (DSM-5 - p. 38). Adaptive functioning consists of three domains: conceptual, social, and practical.
>
> a. Conceptual Skills includes language; reading and writing; and money, time, and number concept. Prior school records indicate Johnny was placed in special education during the third grade. He was exempted from the Texas Assessment of Academic Skills (TAAS) due to his ARD in the fourth and fifth grade. When Johnny was in the 7th grade, his instructional level was at the third grade. In the 8th grade, he tested at the 3rd and 4th grade level for the Texas State-Developed Alternative Assessment (SDA). He dropped out of school in the 9th grade. Johnny was administered the WRAT-IV by this writer to measure his academic skills. Current testing indicated a strength in his phonetic abilities to read words; however, when required to read a short passage and insert a missing word based on contextual skills, his

> abilities were in the extremely low range. These same phonetic skills aided Johnny's spelling (low average range). Johnny exhibited extremely low abilities with his math skills. He was able to solve simple addition, subtraction, and one digit multiplication and division problems. He had difficulty with regrouping, fractions, and decimals.

Id. In that same report, Dr. Mayfield noted several scores that linked his capacity in several aspects of learning, to a grade school equivalent. *Id*. For example, Mr. Avalos's word reading resulted in an grade equivalent of 10.8, with sentence comprehension, spelling, and math computation much lower, at grade equivalents of 3.6, 6.3 and 3.7, respectively. *Id*. Dr. Mayfield elaborates:

> b. Social Skills include interpersonal skills, social responsibility. self-esteem, gullibility, naivete (*i.e.,* wariness), follows rules obeys laws, avoids being victimized, and social problem solving, Johnny was always withdrawn. He preferred to spend time by himself. He had one best friend growing up. He always appeared younger than his peers. According to Crystal, Johnny was frequently bullied in school and kids called him "weird'" or "retarded." Johnny did not have a good self-concept, he would say he was dumb and that he wished he wasn't retarded. Although Crystal is 5-6 years younger than Johnny. she has always felt like he was her younger brother. Johnny never had a girlfriend. Mother reported that Johnny needed assistance to make decisions.

> c. Practical skills include activities of daily living (personal care), occupational skills, use of money, safety, health care, travel/transportation, schedules/routines, and use of the telephone. Johnny does not have a driver's license, but he is able to ride a bicycle. He is able to get around to familiar places using the bus; however, he is not able to read a bus map and someone must teach him the route to go to new places. His mother would write down directions for him. There were a couple of times when he would call his mother because he got lost. He has never had a checking account and does not know how to

manage money. Mother reported that she had to help him with his money. According to his sister, when he is given change, he would not know if the change was correct. He is not able to follow directions to cook for himself. He can use a microwave but not the stove or oven. If given a list of groceries and money. he would have difficulty buying the groceries and paying for them. For safety concerns, he was never given the responsibility to stay home and take care of the younger children. Johnny mowed the lawn for one of his neighbors. Johnny had to be taught to use the lawn mower. However, on one occasion, he put his hand down by the blades while the mower was running. Because of this, Mr. Beltran always supervised him when he was mowing the lawn. Johnny had trouble keeping up with the schedule of when to mow the lawn and would either return to soon or not come for a long time. When Johnny needed to fill out an application, his mother would write down the information and Johnny would copy the information onto the application. At other times his sister Crystal would go with him and fill out the job application for him. Johnny worked as a dishwasher for several years but was ultimately fired when he wrote a derogatory note on Facebook about his boss. According to his sister, Johnny did not understand why this made his boss mad and why he was fired. According to Crystal, Johnny (even as a young adult) required prompting from his mother to brush his teeth. She also helped him dress appropriately for the weather condition.

Criterion 2 “is met when at least one domain of adaptive functioning (conceptual, social, or practical)is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more setting at school, at work, at home, or in the community,” (DSM-V-p. 38). Based on the information that is available at the time of this writing, Johnny meets significant impairment in the adaptive functional areas of conceptual and practical. At this time, more interviews are anticipated to gather more corroborative information.

3. Finally. the third criteria is onset during the developmental years, typically prior to age 18. Records indicated that Johnny always struggled in school and required special education support. Per his mother’s report, all of his developmental milestones were delayed. he was also late to learn to do things, such as to tie his shoes of button his

> shirt. Mother also reported that when Johnny was born his doctor stated that Johnny would always be "retarded." There is clear evident that Johnny's intellectual and adaptive function occurred prior to the age of 18.

CR52. Dr. Mayfield concluded that, "[b]ased on information available at the time of this writing, Johnny meets criteria for a diagnosis of Intellectual Disability based on the information provided above." Dr. Mayfield noted a number of scores with their age-equivalence as they relate to Mr. Avalos's "INTELLIGENCE," as computed through the Wechsler Adult Intelligence Scale-Fourth Edition (WAIS-IV) test, with all scores resulting in an equivalence under age 16 (<16:00). CR54. Her scoring for "ACHIEVEMENT" through the Wide Range Achievement Test - Fourth Edition (WRAT4), on subjects such as "Word Reading," "Sentence Comprehension," "Spelling," and "Math Computation" resulted in equivalents for grade-schools 10.8, 3.6, 6.3 and 3.7, respectively. *Id*.

In a second evaluation from November 6-7, 2018, Dr. Mayfield found the following scores with their respective age equivalence **(boldfaced, in years:months)**:

INTELLIGENCE

General Reasoning Index **< 3:6**

ATTENTION/EXECUTIVE FUNCTIONING

Delis-Kaplan Executive Function System

Verbal Fluency

Letter Fluency	**16:0 – 19:0**
Category	**15:0**
Category Switching Responses	**< 8:0**
Category Switching Accuracy	**9:0**

Free Sorting

Confirmed Correct Sorts	**< 8:0**
Free Sorting Description Score	**< 8:0**
Tower	**30:0 – 39:00**

Comprehensive Trail-Marking Test (CTMT)

Trail 1	**9:0**
Trail 2	**11:00**
Trail 3	**< 8:0**
Trail 4	**< 8:0**
Trail 5	**< 8:0**

Quotient Score 66 (1 percentile)

Reynolds Interference Task (RIT)

Object Interference	**11:00**
Color Interference	**11:00**

MEMORY

Test of Memory and Learning-Second Edition (TOMAL-2)

Memory for Stories	**5:00**
Word Selective Reminding	**< 5:0**
Object Recall	**8:0**
Paired Recall	**5:6**
Facial Memory	**9:0**
Abstract Visual Memory	**9:0**
Visual Sequential Memory	**11:0**
Memory for Location	**8:0**
Digits Forward	**10:6**
Letters Forward	**8:0**
Digits Backward	**11:0**
Letters Backward	**11:0**
Manual Imitation	**14:0**
Visual Selective Reminding	**< 5:0**
Memory for Stories (Delayed)	**5:6**
Word Selective Reminding (Delayed)	**< 5:0**
Memory for Stories (Delayed)	**5:6**
Word Selective Reminding (Delayed)	**5:0**

LANGUAGE

Boston Naming Test – Significantly Impaired

Comprehensive Receptive and Expressive Vocabulary Test – Third Edition – CREVT – 3

Receptive Vocabulary	**10:0**

Academic Achievement Battery (AAB)

Listening Comprehension

Listening Comprehension	
Words/Sentences	**5:2**
Listening Comprehension	
Passages	**4:6**

MOTOR AND VISUAL PERCEPTUAL

Developmental Test of Visual Perception – Adolescent and Adult

Motor-Reduced Visual Perception	
Figure-Ground	**11:0-11:11**
Visual Closure	**11:0-11:11**
Form Consistency	**11:0-11:11**
Visual -Motor Integration	
Copy	**23:0 – 29:0**
Visual-Motor Search	**11:00-11:11**
Visual-Motor Speed	**11:0-11:11**

CR55-59. On

Dr. Kate E. Glywasky

Dr. Kate E. Glywasky, a neuropsychologist hired by the state, evaluated Mr. Avalos, and among materials she reviewed was Dr. Mayfield's first report. CR60. Her background information about Mr. Avalos is largely similar to the history collected by Dr. Mayfield. *Id*. She adds that, "[a]ccording to SMHC 2002 records, the defendant's cognitive functioning was estimated as 'below average,'" with his "cognitive development also described as 'Below' for problem solving." CR62 "Based on a combination of educational history, demographic information, and portions of the current evaluation, Mr. Avalos's premorbid IQ was estimated to fall in the Intellectually Deficient to Borderline range compared to same-aged peers." CR63. As did Dr. Mayfield, Dr. Glywasky, determined through the testing and history collected, that Mr. Avalos scored a "Full Scale IQ" index of "67," which falls within the "1st % ile," described as "Extremely Low." *Id*. She explained that "[b]ased on records reviewed, clinical presentation and test results, the defendant meets diagnostic criteria for Intellectual Disability in accordance with Diagnostic Statistical Manual-5 (DSM-5) and the American Association on Intellectual Developmental Disabilities-11th Edition (AAIDD-11)… In Mr. Avalos's case, his previous and current Full-Scale IQ scores fall below the cut-off score (70 +/- 5)."

CR65.

Dr. Brian P. Skop

Dr. Brian P. Skop, a neuropsychologist hired by the state, evaluated Mr. Avalos, and among materials he reviewed was Dr. Glywasky's report. In his "Conclusion" to his own report, Dr. Skop wrote:

> Mr. Avalos has a mild, intellectual disability. He has had 2 psychological evaluations that included well validated instruments to measure intelligence and achievement. In both cases, his IQ tested in the mild intellectual disability range. His Full Scale IQ on the WAIS-IV tested at 66 on the first assessment and 67 on the second. Collateral information indicates deficits in achievement throughout his life. Additionally, both psychologists administered testing to assess malingered symptoms at the time of their assessments, and despite him admitting to fabricating hearing voices previously, there was no evidence of malingering with respect to these assessments of his intellectual capabilities.

CR70.

Dr. John Fabian

Dr. John Fabian, a neuropsychologist appointed for the defense, evaluated Mr. Avalos, and among materials he reviewed was Dr. Mayfield's first report. CR80-81. He concurred with all of her findings on intellectual disability, and its levels, and also, at the defense's urging, conducted his own testing addressing, specifically, "Attention" and "Executive" functioning, and "Psychopathology." CR80-81. A "DSM-5 Diagnostic Formulation" rendered the following results:

Intellectual Disability

Schizoaffective Disorder, Mixed Type by History

Probable Autism Spectrum Disorder by History

Postrttraumatic Stress Disorder with Complex Trauma

Alcohol Use Disorder

Opioid Use Disorder

Cannabis Use Disorder

CR84. Dr. Fabian also conducted a mitigation assessment report. *Id*. Regarding a connection between Mr. Avalos's intellectual disability, his history of limited mental abilities and his mental illness, when compared to individuals of a juvenile age, Dr. Fabian expressed:

> The U.S. Supreme Court in *Miller v. Alabama* 567 U.S. 460 (2012) held that mandatory sentences of life without the possibility of parole are unconstitutional for juvenile offenders.
>
> Obviously, Mr. Avalos is not a juvenile offender but committed these offenses as an adult. However, in my opinion, he is functioning more like an 8-year old due to his intellectual disability and his lawyer, Mr. Aristotelidis, wants to consider a legal argument that applies the holding in *Miller* to an adult that is intellectually disabled and brain damaged and functions more like a child. Mr. Avalos essentially thinks, acts, and behaves in many ways as a child or adolescent because of his significant brain dysfunction, intellectual disability, and mental illness.
>
> Mr. Avalos presents as a tri-diagnosed individual with the following three areas of diagnoses and dysfunction:

1. Brain dysfunction through intellectual disability
2. Mental illness related to posttraumatic stress disorder/complex trauma and schizophrenia
3. Co-occurring chemical dependency problems to alcohol, cannabis, and opioids.

> There is compelling evidence of impairments as to Mr. Avalos' brain function. Despite him being an adult, he again has a damaged and dysfunctional brain that would be pertinent to impairments in a number of areas, especially related to overall intelligence, language and executive functioning. The holding in *Miller* certainly includes the [United States Supreme Court] recognizing developmental characteristics of adolescents and recent neuroscience research showing that adolescent brains are not fully developed in regions related to higher order executive functions such as impulse control, planning ahead, and risk evaluation. That neuroanatomical deficiency is consonant with juveniles demonstrating psychosocial, social, and emotional immaturity. Along these lines, Mr. Avalos has brain damage and dysfunction related again to his history of intellectual disability coupled with neuropsychiatric disorders of schizophrenia and complex trauma/posttraumatic stress disorder. These conditions cumulatively place him with significant emotional, cognitive, and behavioral impairments that leave him functioning in a childlike fashion. Consequently, these detrimental conditions affecting his brain functioning should be considered as to his overall moral culpability and ultimately as to his sentencing.

CR88-89.

The Fourth Court of Appeals's En Banc Ruling

In an opinion authored by Chief Judge Martinez, a 4-3 *en banc* majority recognized Avalos's sole issue on appeal to be whether section Texas Penal Code Section 12.31(a)(2)'s requirement of an automatic life sentence without parole for capital murder, when the death penalty is not imposed, is unconstitutionally cruel

and unusual as applied to intellectually disabled persons, an issue of first impression before the United States Supreme Court and this Honorable Court. *Avalos v. State*, 616 S.W.3d 207, 209 (Tex. App. – San Antonio 2020) (en banc) (*Avalos II*) [1] The Court agreed that with Avalos that "the prohibition on the automatic imposition of the punishment follows from the Supreme Court's holdings in *Atkins* [*v. Virginia,* 536 U.S. 304 (2002)] and the Court's individualized sentencing cases." Opinion, at 3.

The Court began its analysis by citing the Supreme Court's holding in *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), in which the Supreme Court barred the execution of intellectually disabled individuals on the basis that such sentence was "cruel and unusual punishment within the meaning of the Eighth Amendment." Opinion, at 4 (citing *Atkins*, 536 U.S. at 321). It cites the Supreme Court's recognition that *Atkins's* holding "falls within a line of cases striking down 'sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty.'" Opinion at 4 (citing *Miller v. Alabama*, 567 U.S. 460, 470 (2012) and *Graham v. Florida*, 560 U.S. 48, 60–61 (2010)). It observed that "[c]entral to the Court's reasoning in these cases is 'the basic precept

[1] As to Avalos's Eighth Amendment challenge under the Texas Constitution, the *en banc* court found that, "because there is 'no significance in the difference between the Eighth Amendment's 'cruel and unusual' phrasing and the 'cruel or unusual' phrasing of Art. I, Sec. 13 of the Texas Constitution," the Court addressed Avalos's issue in light of Supreme Court decisions. Opinion at 3 (citing *Cantu v. State*, 939 S.W.2d 627, 645 (Tex. Crim. App. 1997)). Therefore this brief addresses the State and Federal provisions jointly.

of justice that punishment for crime should be graduated and proportioned to both the offender and the offense.'" Opinion at 4 (citing *Miller*, 567 U.S. at 469 (quotations omitted)). Intellectually disabled defendants are "categorically less culpable than the average criminal (Atkins, 536 U.S. at 316)," and "[i]ntellectually disabled individuals 'frequently know the difference between right and wrong and are competent to stand trial,' but 'by definition[,] they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.'" Opinion at 4 (citing Atkins at 318). "These impairments," wrote the Court "make it less defensible to impose the death penalty as retribution for past crimes and less likely that the death penalty will have a real deterrent effect." Opinion at 4 (citing *Roper v. Simmons*, 543 U.S. 551, 563 (2005) (citing *Atkins*, 536 U.S. at 319–20)). "Additionally," it found, "by nature of their diminished faculties, intellectually disabled defendants face an enhanced possibility of false confessions and a lessened ability to give meaningful assistance to their counsel." Opinion at 4 (citing *Atkins*, 536 U.S. at 320–21). "Following *Atkins*, the Supreme Court [in *Miller*] decided that juvenile offenders, like intellectually disabled offenders, are in a class of defendants that is 'constitutionally different' from other defendants for sentencing purposes." Opinion at 4 (citing *Miller*, 567 U.S. at 471). "Members of each class of defendants have diminished culpability

compared to other offenders." Opinion at 4-5 (citing *Roper*, 543 U.S. at 570–71; *Atkins*, 536 U.S. at 318–20). "While differences exist," noted the *en banc* court "this fundamental similarity makes the imposition of the death penalty excessive for individuals in each group." Opinion at 5 (citing *Roper*, 543 U.S. at 572–73; *Atkins*, 536 U.S. at 321). "Therefore," it further noted, "the harshest penalty that can be imposed on individuals in each group is life imprisonment without parole." Opinion at 5 (citing *Miller*, 567 U.S. at 470, 476–78; *cf. Graham*, 560 U.S. at 69 ("[L]ife without parole is the second most severe penalty permitted by law." (quotations omitted)). The Court added the Supreme Court's observation that, "[a]s with a death sentence, imprisonment until an offender dies "alters the remainder of [the offender's] life by a forfeiture that is irrevocable." Opinion at 5 (citing *Miller*, 567 U.S. at 474–75 (quotations omitted)).

The *en banc* court observed that in *Miller*, the Supreme Court found that "a mandatory imposition of a life sentence without parole on a juvenile 'runs afoul of . . . [the] requirement of individualized sentencing for defendants facing the most serious penalties.'" Opinion at 5 (citing *Miller*, 567 U.S. at 465). Miller further held that "[a] defendant facing the most serious penalties must have an opportunity to advance mitigating factors and have those factors assessed by a judge or jury." Opinion at 5 (citing *Miller* at 489) ("*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to

consider mitigating circumstances before imposing the harshest possible penalty for juveniles."); *see also Woodson v. North Carolina*, 428 U.S. 280, 304–05 (1976) (plurality opinion) (holding that a statute mandating a death sentence for first-degree murder violated the Eighth Amendment). [2]

The *en banc* court agreed that "a life sentence without parole may be 'an especially harsh punishment for a juvenile[, who] will on average serve more years and a greater percentage of his life in prison than an adult offender,' but added that "the difference in severity of the sentence when applied to a juvenile compared to an adult is one of degree." Opinion at 5, n.3 (citing *Graham*, 560 U.S. at 70). The Court added that "[i]n other respects, the disproportionality of the punishment can be similar if mitigating factors are not considered. Diminished culpability for juvenile offenders and intellectually disabled offenders lessens the penological justifications for a sentence of life imprisonment without parole, which can render the sentence disproportionate." Opinion at 5, n.3 (citing *Graham* at 71–74; *Atkins*, 536 U.S. at 318–20). The Court closed with the following:

> As with juveniles—for whom "*Graham* and *Roper* and [the Supreme Court's] individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult," *Miller*, 567 U.S. at 477—so too with the intellectually disabled; for them, the Supreme Court's decisions in

[2] The Court rejected the State's reliance on *Harmelin v. Michigan*, 501 U.S. 957 (1991), for the proposition that, absent a direct ruling by the Supreme Court to the contrary, *Harmelin's* holding that an automatic life sentence for adults of ordinary intelligence is constitutional should also control to reject Avalos's challenge. This is discussed further below.

> *Atkins* and its individualized sentencing cases teach that a sentencer misses too much in imposing a State's harshest penalties if he treats every intellectually disabled person as alike with other adults. *See Atkins*, 536 U.S. at 316 (explaining that society views intellectually disabled defendants as "categorically less culpable than the average criminal"). Because Texas Penal Code section 12.31(a)(2) automatically imposes life imprisonment without parole, which is the harshest sentence an intellectually disabled person faces, the statute is unconstitutional as applied to intellectually disabled persons based on the combined reasoning of *Atkins* and the Court's individualized sentencing cases, which entitle defendants to present mitigating evidence before a trial court may impose the harshest possible penalty. *See id.*; *Miller*, 567 U.S. at 475–76.4
>
> ***
>
> Because our ruling follows from precedent and does not categorically bar any penalty, there is no need to review legislative enactments to discern "objective indicia of societal standards." *See Miller*, 567 U.S. at 482–83 (explaining that because the Court's holding did not categorically bar a penalty for a class of offenders or type of crime and the decision followed from precedent, the Court was not required to scrutinize legislative enactments before holding a practice unconstitutional under the Eighth Amendment); *cf. Graham*, 560 U.S. at 61 (explaining that in cases adopting categorical rules, "[t]he Court first considers 'objective indicia of society's standards, as expressed in legislative enactments and state practice,' to determine whether there is a national consensus against the sentencing practice at issue.").

Opinion at 6. The Court held that "section 12.31(a)(2) of the Texas Penal Code is unconstitutional as applied to intellectually disabled persons, and that the trial court erred by denying Avalos an opportunity to present mitigating evidence before imposing the sentences of life imprisonment without parole," and remanded the cases for further proceedings consistent with its opinion.

RESPONSE ISSUES

A. *Harmelin* does not Control the Resolution of Avalos's Challenge

Despite being rejected as viable authority on the subject of Avalos's challenge by both the *en banc* majority (*Avalos II*, at 210 n.2) *and* the panel majority, on original submission, *Avalos v. State*, 616 S.W.3d 214 (Tex. App. – San Antonio 2020) *overruled by* 616 S.W.3d 207 (Tex. App. – San Antonio 2020) (en banc) (*Avalos I*, at 217-218), the State again offers *Harmelin v. Michigan*, 501 U.S. 957 (1991) as controlling authority that denies Avalos relief - that is, according to the State, until the Supreme Court determines otherwise. As was noted by the *en banc* majority, *Harmelin* is inapposite to Avalos's challenge because it "had nothing to do with [intellectually disabled persons]," and citing *Miller*, 567 U.S. at 481 it declined to extend *Harmelin* to juveniles because "*Harmelin* had nothing to do with children." *Avalos II* at 210, n.2. As *Miller* observed when evaluating *Harmelin's* application to its analysis, the State's efforts to force-feed *Harmelin's* holding to Avalos's appeal is "myopic." *Miller* at 481. Just as "*Harmelin* had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders," it also did not contemplate intellectually disabled adults in reaching its highly fractured holding. *Id*.

For its part, the original panel's majority also parted ways with *Harmelin*, also on the basis that it had nothing to do with children, and because it did not address

intellectual disability. *Avalos I*, at 218. And, the majority panel went further, noting that despite reaching a majority it is ultimate holding, "the plurality and the concurrence [in *Harmelin*] disagreed as to the appropriate legal principles and modes of constitutional interpretation, and the Supreme Court later rejected the plurality's approach in subsequent cases, including *Atkins*." *Id*. The majority panel elaborated that "the *Harmelin* plurality rejected proportionality as a consideration and construed the Eighth Amendment's phrase 'cruel and unusual' considering the original intent of the language as used in the 1700s (citing *Harmelin* at 965 ("[T]he Eighth Amendment contains no proportionality guarantee.")," which is at odds with the Supreme Court's later analysis in *Atkins*, which "considered proportionality and construed the phrase 'cruel and unusual' in 'evolving standards of decency' and 'contemporary values.'" *Id*. (citing *Atkins* at 536 U.S. at 311–12). [3]

Harmelin's factually and legally distinguishable, fractured holding does not control the resolution of Avalos's challenge, and should be rejected by this Court in its analysis.

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[3] The State also relied on *Modarresi v. State*, 488 S.W.3d 455, 466 (Tex. App.—Houston [14th Dist.] 2016, no pet.), in which the Houston court of appeals relied on *Harmelin* to reject a contention that section 12.31(a)(2) was unconstitutional as applied to someone suffering from "mental illness, particularly post-partum depression associated with Bipolar Disorder." As noted by the dissent, the court in *Modarresi* noted the Supreme Court in *Harmelin* held an automatic life sentence without parole is constitutional without exception (*Avalos I* at 218, (J. Chapa, dissenting)), which is at odds with *Atkins's* later treatment of the issue.

B. The State Mischaracterizes *Miller's* Holding

In support of its "youthful immaturity is transient, intellectual disability is not" theory, the State cites *Miller's* discussion about material distinctions between juveniles and adults, and simply throws "intellectually disabled" adults into the mix. SB 25 (The obvious difference between juveniles and adults—*including intellectually disabled adults*—…) (emphasis added). The difference may be "obvious" to the state, but this does not command an acceptance of this sweeping proposition. The State has taken considerable license in assuming - and asking this Court to assume - that when the Supreme Court in *Miller* discussed these differences, its net was cast so wide as to have also considered intellectually disabled adults. Just like *Harmelin* did not discuss intellectually disabled adults (or children) in reaching its fractured holding, *Miller* did not differentiate between juveniles and intellectually disabled adults. The State's claim in this regard is unsupported. Consequently, its references to portions of *Miller* to support this proposition are inapposite to a resolution of Avalos's challenge.

C. The State Employs a Flawed Analogy in Applying *Miller* to Avalos's Case

The State argues that intellectually disabled offenders are not sufficiently analogous to juveniles to warrant individualized sentencing hearings. State's Brief (SB) at 25. Of note, the State does not categorically repudiate an analogy between each category of offender, but posits the *insufficiency* of that analogy, and then

supports it on the basis of a faulty premise, comparing a class of individuals, with a *single trait* of another. Arguing that "[y]outhful immaturity is transient, while intellectual disability is not," (SB 25) the state compares apples to oranges. Rather, the proper comparison, and resulting categories at issue should be of intellectually disabled adults *vis* juveniles, each as a class. Youthful immaturity is but a juvenile trait, and one that, contrary to the State's assertion, was not the predominant factor that drove *Miller's* holding. As *Miller* explained, "'just as the chronological age of a minor is itself a relevant mitigating factor of great weight, *so must the background and mental and emotional development of a youthful defendant be duly considered*,' in assessing his culpability." *Miller*, at 476 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) (emphasis added). Indeed, juveniles have been recognized as "incorrigible" in *Miller* (at 479-80) ("…the rare juvenile offender whose crime reflects irreparable corruption.") (citations omitted), and more recently, in *Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016) (*Miller* did not foreclose a life without parole sentence on a juvenile, reserved "for all but the rarest of children, those whose crimes reflect 'irreparable corruption.'"). Despite the static nature of an adult's intellectual disability diagnosis, it is without cavil that many possess the capacity to cope - and *do* cope - with their environment, correct their behavior, and live productive lives. Nothing in *Miller*, *Montgomery*, or any other authority since *Miller* undermines this reality. More importantly, Avalos reiterates that since *Miller*,

there has been no holding, from any court, that has denied *Miller's* extension to intellectually disabled adult by relying on studies or other reliable data showing that intellectually disabled adults, as a class, are, as it were, "more incorrigible" than juveniles. [4] As noted in *Miller*, "[l]ife without parole "forswears altogether the rehabilitative ideal." *Miller* at 473. (citing *Graham v. Florida*, 560 U.S. 48, 74 (2010). "It reflects 'an irrevocable judgment about [an offender's] value and place in society," at odds with a child's capacity for change.'" *Id*. Other than a conclusory position that intellectually disabled adults are incapable of change, or even, for that matter, that though capable of change, intellectually disabled adults can never, *as a class* measure up to juveniles, the State offered no expert testimony to counter the findings by Avalos's own experts, and no language from any learned treatise or opinion that analyzes this question from a scientific, or other comparatively meaningful perspective.

Because it has found no such data, or studies, the State must ignore and mischaracterize this fact to prevail. Respectfully, the proper focus should be, not on

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[4] Like the State has done in this case, the cases that have so far declined to extend *Miller's* holding to intellectually disabled adults (many cited by the State and the *en banc* minority) have done so by way of a categorical, and conclusory fashion. For example, in *People v. Coty*, ___ N.E.3d ___, 2020 WL 2963311, at *10 ¶ 39 (Ill. June 4, 2020), in overruling the intermediate court's ruling that extended *Miller's* reasoning in a case involving a *de facto*-life-without-parole sentence of 50 years for an intellectually disabled man, the Court wrote, without further elaboration: "[U]nlike a juvenile, whose mental development and maturation will eventually increase [rehabilitative] potential, the same cannot generally be said of the intellectually disabled over time." *See* SB at 26.

comparing the permanence of an adult's intellectual disability diagnosis against a single, relevant juvenile trait, but on accepting that intellectually disabled adults and juveniles *both* possess the capacity to improve, or, for that matter, fail. Moreover, because this analysis varies greatly depending on the individual characteristics of the juvenile or the intellectually disabled adult, their punishment should be resolved by way of an individualized sentencing process.

D. This Court's Familiarity with Adaptive Behavior as a Means to Identify Intellectually Disabled Adults as a Class Exempt from Automatic, Life Without Parole Sentences

Yet, despite the lack of data promulgated by the Courts that have denied an extension of *Miller's* holding to intellectually disabled adults, Avalos does not write on a blank slate. There is significant state precedent from this Court that not only recognizes the capacity of intellectually disabled adults to adapt to their environment, but also considers deviations from this process to be a critical element (of three *Briseño* factors approved by the Supreme Court in *Moore I* and *II*) in determining whether an adult convicted of capital murder is ultimately diagnosed as intellectually disabled, and is therefore immune from a death sentence.

In *Ex Parte Briseño*, this Court designed a test to determine whether adults convicted of capital murder qualified as intellectually disabled, to determine their eligibility for the death penalty. *See generally Ex parte Briseno*, 135 S. W. 3d 1 (Tex. Crim. App. 2004) (*overruled by Moore v. Texas*, 137 S. Ct. 1039 (2017) (*Moore I*);

(*Moore v. Texas*, 139 S. Ct. 666, 672 (2019) (*Moore II*). The elements, known as the "*Briseño* factors" included, in relevant part, the identification and evaluation of "adaptive deficits, 'assessed using both clinical evaluation and individualized . . . measures…'". *See Moore II*, at 668 (citing American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) (DSM-5), at 38.). [5] The United States Supreme Court has approved of this factor as "valid" in determining a diagnosis of intellectual disability, in this context. *Moore II*, at 668. The term "adaptive behavior" is defined by Tex. Health & Safety Code section 591.003(1) to mean "the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group." *See Briseño*, 135 S. W. 3d at 7 n.25. "Impairments in adaptive behavior are defined as significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group, as determined by clinical assessment and, usually, standardized

[5] Under the Texas scheme, "[t]o make a finding of intellectual disability, a court must see: (1) deficits in intellectual functioning—primarily a test-related criterion, see DSM-5, at 37; (2) adaptive deficits, "assessed using both clinical evaluation and individualized . . . measures," ibid.; and (3) the onset of these deficits while the defendant was still a minor, (DSM-5) at 38." *Moore II*, at 668. The surviving *Briseño* factors are commensurate with those in *Atkins*, which recognized that "clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *See Atkins* at 318.

scales." *Id*. (citing American Association on Mental Retardation (AAMR), at p. 11); Tex. Health & Safety Code section 591.003(13).

True, adaptive behavior and its measured deficits have served as a means for Texas courts to determine the existence of an intellectual disability finding – undisputed Avalos's case – and not to gauge *Miller's* applicability to Avalos's constitutional claim. But the factors mimic language in *Atkins* that the Supreme Court found essential to prohibit the execution of the intellectually disabled, and which the Fourth Court's *en banc* majority found to be a natural fit to Avalos's challenge, and on which it relied on to support its holding:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition *they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.* (citation omitted) *There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.* (citation omitted) Their deficiencies do not warrant an exemption from criminal sanctions, *but they do diminish their personal culpability*.

Atkins, at 318. To support an extension of *Miller's* holding to intellectually disabled adults, Avalos submitted for the trial court, and on appeal, the medical findings by Drs. Joan Mayfield and John Fabian, neuropsychologists appointed by the district court to assist in Avalos's defense. *Infra*. Dr. Mayfield provided detailed testing to

support school grade and age equivalence between juveniles and Avalos. Dr. Fabian opined that Avalos was "functioning more like an 8-year old due to his intellectual disability," elaborating that "Mr. Avalos essentially thinks, acts, and behaves in many ways as a child or adolescent because of his significant brain dysfunction, intellectual disability, and mental illness." Through their medical findings, Mayfield and Fabian drew a clear parallel that bridges the intellectual capacity and other mental processes of juveniles, and adults like Avalos, who suffer from intellectual disability and specifically identified mental illnesses. None of this objective evidence was discussed by the majority panel in its opinion. This Court can now do so, and sustain Avalos's challenge.

Consistent with norms established by the American Bar Association Guidelines for Capital Defenders, the United States Supreme Court's holding in *Wiggins v. Smith,* 539 U.S. 510 (2003), and the Guidelines and Standards for Texas Capital Counsel as promulgated by the State Bar of Texas, defense counsel representing capital murder defendants are required to conduct a complete and thorough investigation of the capital defendant, his background, his mental health and whether or not he/she is intellectually disabled, and further, to be prepared to present all evidence that would mitigate against the imposition of the most severe punishment that the law provides. However, despite all of the defense team's best efforts, there is no vehicle under the present Texas Capital Murder statute whereby

a jury is allowed to hear any evidence on punishment or any evidence that would mitigate against the imposition of a life without parole sentence. Under the capital murder scheme as currently set out in Sec. 12.31(a)(2), Avalos is prohibited from presenting any evidence to mitigate against the imposition of the most severe sentence, other than death. The reports provided in support of Mr. Avalos's arguments, particularly the one submitted by Dr. Fabian, contain but a snapshot of the extensive mitigation evidence that could still be presented on behalf of Mr. Avalos at a hearing under a sentencing scheme that permits a sentence within the full range of punishment for a non-capital, murder conviction, up to, and including life without parole. Without question, capital offenses represent the most serious types of crime in our system of justice. But this should not preclude a trier of fact from considering all mitigation and other evidence relevant to a proper punishment, as is now required with juveniles who are convicted of capital crimes. [6]

In light of the novelty of Avalos's challenge, this Court's own history with and development of all relevant aspects of an intellectually disabled adults' adaptive behavior provides the means to identify the similarities between juveniles and intellectually disabled adults, to sustain a finding that like the former, individuals in

[6] The subject of what sentencing options, other than life without parole, would be available to Avalos on remand, is discussed below.

Avalos's shoes deserve an individualized sentencing scheme that provides an option other than automatic life without parole.

D. A National Consensus, and the Sentencing Laws or Practices of Other States Is Not Necessary for a Proper Resolution of Avalos's Challenge

The State takes issue with Avalos' failure to provide any citations, discussion, or analysis of objective evidence [7] of evolving standards of decency, such as the sentencing laws or practices of other states. [8] But as the lone dissent on original submission noted (*Avalos I*, at 219), and the *en banc majority* made clear (*Avalos II*, at 211 n.4), a careful review of *Miller* shows that the Supreme Court specifically rebuffed the collection of legislative enactments from different states that the State of Alabama offered as a counter to *Miller's* arguments, when addressing the evolving standards of decency topic. But because the Supreme Court's holding did not categorically bar a penalty for a class of offenders or type of crime, and its decision followed from precedent, the Court was not required to scrutinize legislative enactments from other states. *See Miller*, 567 U.S. at 482-83. [9] Restated, because Avalos does not seek to categorically bar the imposition of a life without parole sentence - permitted as to juvenile offenders under *Miller*- but rather invites precedent that only requires a process that considers mitigating and other evidence

[7] As he noted above, Avalos presented objective evidence, specifically, the medical findings by experts Mayfield and Fabian.

[8] *See Avalos I*, at 219.

[9] The State did not, in its original response, raise Avalos's apparent failure to discuss legislative enactments, as necessary for Avalos to present his constitutional challenge.

before a life without parole sentence can be imposed (*also Miller*), a discussion about our state's laws on the subject, deemed necessary to resolve *Graham* and *Atkins* - is not required to address Avalos's challenge.

E. The Question of Avalos's Sentence on Remand

The State submits that, if this Court affirms the Fourth Court's *en banc* ruling, it should take this opportunity to resolve a remaining, relevant question: What is the allowable range of punishment? SB 37. Respectfully, Avalos does not concur with the State's proposition that the Court address the sentencing issue as part of Avalos's constitutional challenge on appeal. Notwithstanding the interests of judicial economy, a remand allows the parties to fully litigate an issue of first impression that has not yet been fully resolved. A remand allows the parties to better prepare to better address the specific holding by this Court on the constitutional question. After all, irrespective of whether this Court affirms (in whole or in part), the reasoning behind the holding may require the presentation of additional evidence that was not submitted before the trial court.

That said, Avalos concedes that after remand, current precedent from this Court may prompt it to resolve the sentencing question by allowing the consideration of mitigating and other evidence before the trial court, in support of the alternative, and only option, a life sentence with the possibility of parole, as held in *Ex parte*

Maxwell, 424 S.W.3d 66 (Tex. Crim. App. 2014), and later approved in *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016) [10]

Notwithstanding, a sentence of life with parole for Avalos could be, under a non-capital murder statutory scheme, 5-99 or a 30 (life), before he becomes eligible for release. Avalos submits that such a sentence would constitute a *de facto* life sentence without parole, that would violate the Eighth Amendment's cruel and unusual punishment clause, for the reasons he has alleged in this appeal. It cannot be gainsaid that a sentence of 30 calendar years is not, for all practical purposes, the equivalent of a death sentence through permanent confinement. To the extent that current precedent forecloses Avalos's argument, he submits this objection for a ruling, and preserves same for a later resolution by the United States Supreme Court.

CONCLUSION

Writing for the Fourth Court's en banc minority, Justice Chapa expressed that Avalos's constitutional issue was "challenging because we must set aside our personal beliefs about the fairness of Texas's sentencing practices. From a public policy perspective, Texas's sentencing laws could and should be fairer in considering intellectually disabled offenders' diminished culpability." *Avalos II* at 213 (J. Chapa, dissenting). Justice Chapa elaborates that "[t]he Texas Legislature

[10] The Wyoming statute in *Montgomery* required 25 years incarceration before the juvenile defendant became eligible for parole. Texas requires 40. *See Shalouei v. State*, 524 S.W.3d 766, 769 (Tex. App. 2017).

should therefore consider revising Penal Code section 12.31(a) to account for the diminished culpability of intellectually disabled capital offenders as a matter of public policy." *Id*. "Such a legislative change," she adds, "would provide fairness and justice for intellectually disabled offenders in future cases without the retroactive ramifications of premature constitutional declarations by the judiciary." *Id*.

Avalos disagrees with Justice Chapa that this Court does possess the Supreme Court's constitutional mandate to render the relief that Justice Chapa accepts as just, to intellectually disabled adults. To the extent that relief can be provided by the legislature, this expectation fell on deaf ears after the *Briseño*, well-intentioned experiment in 2004. The current state of this state's politics practically guarantees that Justice Chapa's wish will not be fulfilled by our elected officials. This Court has the constitutional, and moral mandate, to provide Avalos, and those in his class, a just sentencing process.

The Defendant is intellectually disabled. He has mitigation and scientific evidence to present that a jury could consider as militating against the imposition of a sentence of life without the possibility of parole. The characteristics of persons with intellectual disability are substantially the same as those of juveniles. The Supreme Court has held that juveniles are categorically ineligible for the imposition of the death penalty. *See Roper, supra*. The Supreme Court has held that the mentally

retarded (intellectually disabled) are categorically ineligible for the imposition of the death penalty. *See Atkins, supra.* The U.S. Supreme Court has held that juveniles are categorically ineligible for the imposition of a life without parole sentence. *See Miller, supra.* All three decisions were Eighth Amendment cases that determined capital punishment was cruel and unusual for juveniles and the intellectually disabled. The Defendant is similarly situated as those capital defendants in these cases and accordingly submits that, as applied to an adult, intellectually disabled class, Texas Penal Code Section 12.31(a)(2) is unconstitutional and violates the Eighth Amendment to the United States Constitution.

PRAYER

WHEREFORE, the Appellant requests that the Court grant affirm the Fourth Court of Appeals's *en banc* majority's ruling, and that it declare Texas Penal Code Section 12.31(a)(2) unconstitutional because it requires, as a default alternative punishment to the death penalty, an automatic sentence of life without parole, in violation of the Eighth Amendment's Cruel and Unusual Punishment clause. Avalos further petitions that after this ruling, the Court reverse Avalos's sentence and that it remand the case to the trial court for an individualized sentencing process that permits the presentation or mitigation and other relevant and necessary evidence.

Respectfully submitted,

JORGE G. ARISTOTELIDIS
Tower Life Building
310 South St. Mary's St.
Suite 1910
San Antonio, Texas 78205
(210) 277-1906
jgaristo67@gmail.com

By: /s/ JORGE G. ARISTOTELIDIS
SBN: 0078357

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Rehearing *En Banc* was served upon Mr. Andrew Warthen, Assistant District Attorney for Bexar County, Texas in charge of all case briefing, *via* email at AWarthen@bexar.org, and upon Ms. Stacey Soule, State Prosecuting Attorney, at information@spa.texas.gov, on the 14th day of June, 2021.

By: /s/ JORGE G. ARISTOTELIDIS
SBN: 0078355

CERTIFICATE OF COMPLIANCE

In accordance, and in compliance with Tex. R. App. P. 9.4(i)(2)(B), I hereby certify that this Appellant's Brief on the Merits contains 7,683 words, which have been counted by use of the *Word* program with which this brief was written.

By: /s/ JORGE G. ARISTOTELIDIS
SBN: 0078355

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Jorge Aristotelidis on behalf of George William Aristotelidis
Bar No. 783557
jgaristo67@gmail.com
Envelope ID: 54447405
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Andrew Warthen		AWarthen@bexar.org	6/15/2021 4:34:05 PM	SENT